IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.4326 OF 2003
IN
FIRST APPEAL NO.387 OF 1984

Mohamed Husain Iqbal Husain Rampurwala	...	Petitioner
Vs.		
The Board of Trustees of the Port of Bombay.	...	Respondents

Mr. Mridula Bhatia i/b Zaidy & Co. for the petitioner.

Mr. U.T. Makhija with Mr. Hemant Shah i/b Mulla & Mulla & C.B.C. for the respondents.

CORAM: SMT. RANJANA DESAI, J.

DATED: 18TH MARCH, 2005.

P.C.:-

1. In this civil application, original defendant 1 i.e. respondent 1 has prayed that the judgment and order dated 10/2/2000 passed by Justice R.J. Kochar in First Appeal No.387 of 1984, be set aside.

2. I have heard, at some length, Ms. Bhatia, the learned counsel appearing for the petitioner/respondent 1. She contended that the suit property was agreed to be assigned to M/s. Fonda Investments Pvt. Ltd. and, therefore, no sooner the petitioner/respondent 1 was served with the process, M/s. Fonda Investments Pvt. Ltd., who had agreed to take the suit property on

assignment had agreed to attend to the appeal to safe guard the respondents' interest. The petitioner/respondent 1 handed over all the papers and proceedings to one Advocate Mr. Rajiv Narulla, who was looking after the affairs of M/s. Fonda Investments Pvt. Ltd. regarding the suit property. Advocate Narulla assured the petitioner/respondent 1 that he would cause his appearance on behalf of the petitioner/respondent 1 in the appeal to be filed and he would do the needful. By letter dated 4/12/1995, the said Advocate Narulla intimated to the Advocates and Solicitors of the respondents/appellants in the appeal that he had entered the appearance on behalf of the petitioner/respondent 1. Thereafter, petitioner/respondent 1 was not aware as to what progress was made in the appeal and, he totally relied upon Advocate Narulla, until he received information from M/s. Fonda Investments Pvt. Ltd. about the dismissal of the appeal. Thereafter, the present civil application has been filed for setting aside Justice R.J. Kochar's order.

3. It is significant to note that Justice R.J. Kochar disposed of the appeal on 10/2/2000. The present civil application is filed on 7/1/2003. In the civil application, it is not stated as to when exactly the petitioner/respondent 1 came to know about the passing of the decree against the respondents. It is merely stated in paragraph 3 that recently when he has been intimated by M/s. Fonda Investments Pvt. Ltd. that a decree came

to be passed against the respondents in the said appeal by His Lordship Shri R.J. Kochar on 10/2/2000, this petitioner came to know, for the first time, about passing of the decree against the respondents in the said appeal. This is a very vague averment. The petitioner/respondent 1 ought to have stated as to when exactly the petitioner/respondent 1 got to know about the passing of the judgment by Justice R.J. Kochar. Another significant aspect of the matter is that this civil application is filed by the petitioner/respondent 1, inter alia, on the ground that respondents 2 and 3 were not alive when Justice Kochar delivered the judgment and, therefore, that judgment is a nullity. However, heirs of respondents 2 and 3 have not moved this court. If at all, the heirs of respondents 2 and 3 were aggrieved, they would have filed the civil application for setting aside the decree. This casts a shadow of doubt on the petitioner/respondent 1's bonafides. Moreover, it appears that respondents 1 to 3 are joint lessees. Respondent 1 was alive when the judgment was delivered. The judgment would, therefore, bind him. This delayed attempt appears to be aimed at somehow getting the decree set aside.

4. My attention is drawn to the judgment of the Supreme Court in **State of Punjab v. Nathu Ram, AIR 1962 SC 89**. **Nathu Ram's case (supra)** cannot apply to the present case. In that case, the Supreme Court was considering what is the effect of the abatement of the appeal against

the co-respondent of the deceased respondent. The Supreme Court observed that when Order 22 Rule 4 of the Civil Procedure Code does not provide for the abatement of the appeals against the co-respondents of the deceased respondent, there can be no question of abatement of the appeals against them. The only question is whether the appeal can proceed against them. The Supreme Court clarified that that will depend on facts and circumstances of each case. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the courts coming to a decision which will be in conflict with decision between the appellant and the deceased respondent (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds will be ineffective, that is to say, it could not be successfully executed. Such is not the case here. No such case is even attempted to be made out in the civil application. In **Daya Ram & Others v. Shvam Sundari and others, AIR 1965 SC 1049**, the Supreme Court referred to **Nathu Ram's case (supra)** and affirmed the view taken by the Supreme Court in that case. The petitioner/respondent 1 cannot draw any support from this judgment as the civil application contains no proper averments, it suffers from unexplained latches and the petitioner's conduct of waiting for such a long time creates suspicion about his bonafides.

5. Reliance is placed on the judgment of the Supreme Court in **Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and others, AIR 1987 SC 1353**, to contend that the delay in approaching this court deserves to be condoned and the court should adopt a liberal approach. For the same proposition, another judgment of the Supreme Court in **Indra Nand Mishra & Ors v. State of Bihar & Ors. JT 2000(5) SC 390** is relied upon. There can be no dispute about this fact. But there is no absolute rule that in all cases delay should be condoned. It depends on facts and circumstances of each case. In my opinion, the above judgments will not be applicable to the present case because of the circumstances stated by me hereinabove which create doubt about the bonafide's of the petitioner.

6. It was argued that for the advocate's negligence, parties should not be made to suffer. There is no substance in this submission. It is admitted by the petitioner/respondent 1 that he had asked M/s. Fonda Investments Pvt. Ltd. to attend to the appeal and to safeguard the respondent's interest. Therefore, it appears that right from the beginning the respondents did not take keen interest in prosecuting the litigation. Even after the ex-parte decree came to be passed, respondent 1 has not taken prompt steps and not stated as to when exactly he came to know about the passing of the decree. In view of the conduct of the

petitioner/respondent 1, in my opinion, no relief can be granted.

7. Civil application is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)